88-905

No. ___

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

and

DONALD P. HODEL, ET AL,

v.

BOB MARSHALL ALLIANCE, ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERIC TWELKER
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264

WILLIAM H. COLDIRON
Counsel of Record
Gough, Shanahan, Johnson & Waterman
301 First National Bank Building
Helena, Montana 59624

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The federal government issued oil and gas leases on large expanses of unexplored public lands. While the government did not retain the specific right to prohibit development; lessee's future exploration and development proposals would require permits and environmental review. For purposes of the decision, the probability of oil or gas production on each lease was about two percent, the normal for federal leases. The Tenth Circuit Court of Appeals has upheld staged review procedure, while the Ninth Circuit has rejected it.

The questions presented are:

1) Whether lease issuance triggers a NEPA requirement for an Environmental Impact Statement considering unproposed and unlikely future exploration, development and production.

2) Whether lease issuance triggers an Endangered Species Act requirement for a biological opinion considering unproposed and unlikely future exploration, development and production.

LIST OF PARTIES

Government parties are Donald P. Hodel, Secretary of the Interior; Richard E. Lyng, Secretary of Agriculture; Robert Burford, Director of the Bureau of Land Management; F. Dale Robertson, Chief of the United States Forest Service; Marvin LeNoue, Montana State Director of the Bureau of Land Management; and John W. Mumma, Regional Forester, Region 1.

Respondents are Bob Marshall Alliance and the Wilderness Society.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. IN *BOB MARSHALL*, THE NINTH CIRCUIT REJECTED LONG ESTABLISHED NEPA REVIEW PROCEDURES UPHELD BY THE TENTH CIRCUIT IN *PARK COUNTY*	6
A. The Circuits Are in Conflict over the Need for a Leasing EIS	6
B. Segmented Decision-Making Is a Result of the Split between Circuits, Not a Way Around the Split	9
II. IN *BOB MARSHALL*, THE NINTH CIRCUIT REJECTED LONG ESTABLISHED ESA REVIEW PROCEDURES UPHELD BY NUMEROUS CIRCUIT COURT DECISIONS	10
III. CONTINUATION OF THE SPLIT IN THE CIRCUITS WILL ALLOW SPECIAL INTEREST GROUPS TO VETO ISSUANCE OF FEDERAL OIL AND GAS LEASES	12

TABLE OF CONTENTS–Continued

Page

A. Practical Constraints Will Allow Anyone with a Lawyer to Stop Mineral Development on the Public Lands 12

B. The Decision Replaces a Logical and Comprehensive Land Use Planning System with a Fragmented One Suited to Special Interests 13

IV. ABSENCE OF THE GOVERNMENT IS NOT DISPOSITIVE OF THE CERT-WORTHINESS OF THIS PETITION 15

CONCLUSION 18

APPENDICES ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988) ..... *passim*

Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982)..... 9, 11

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988).. *passim*

Lyng v. Northwest Indian Cemetery Protective Ass'n, ___ *U.S.* ___, 108A S.Ct. 1319 (1988).....15

North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) 11

Park County Resource Council v. United States Department of Agriculture, 817 F.2d 609 (10th Cir. 1987)..... *passim*

Sierra Club v. Peterson, 717 F.2d 1409 (D.Cir. 1983) . 9, 12

Vermont Yankee Nuclear Power Corp v. NRDC, 435 U.S. 519 (1978) 10

Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).....11

STATUTES

The Multiple Use and Sustained Yield Act
16 U.S.C. §§ 528-531 (1982) 14

The Wilderness Act
16 U.S.C. §§ 1131-1136 (1982) 3

The Endangered Species Act
16 U.S.C. §§ 1531-1543 (1982) 3, 5

16 U.S.C. § 1536 (1982) 10

TABLE OF AUTHORITIES–Continued

Page

The National Forest Management Act
16 U.S.C. §§ 1600-1614 (1982) 5, 13

16 U.S.C. § 1600(3) (1982) 14

The Mineral Leasing Act
30 U.S.C. §§ 181-287 (1982) 2, 3

The National Environmental Policy Act
42 U.S.C. § 4332(2)(C) (1982) 2, 4

42 U.S.C. § 4334 (1982) 2, 18

The Federal Land Policy and Management Act
43 U.S.C. §§ 1711-1722 (1982) 13

No. ___

In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

and

DONALD P. HODEL, ET AL,

v.

BOB MARSHALL ALLIANCE, ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Paul C. Kohlman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on August 1, 1988.

OPINIONS BELOW

The Ninth Circuit issued its opinion in *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), on August

1, 1988. It is reproduced as Appendix A, App. 1. The opinion of the District Court for the District of Montana is reproduced as Appendix B, App. 20.

This case is closely related to *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), which the Ninth Circuit finally decided on July 27, 1988. *Conner* is the subject of a Petition for a Writ of Certiorari filed by Sun Exploration and Production Company, et al, on November 25, 1988. Petitioner requests that *Conner* and *Bob Marshall* be consolidated for review.[1]

JURISDICTION

The Ninth Circuit entered judgment on August 1, 1988. Justice O'Connor entered an order granting the Petitioner an extension of time until November 29, 1988, to file this petition. The Court's jurisdiction to review the Ninth Circuit's judgment rests on 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

This case arises under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1982) ("MLA"); the National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982) ("NEPA"); and the Endangered Species Act, 16 U.S.C.

[1] Sun Petition appendix page references to the *Conner* and *Park County* opinions are referenced in footnotes to this petition.

§§ 1531-1543 (1982) ("ESA"). Pertinent sections of these statutes are reproduced as Appendix C, App. 42.

STATEMENT OF THE CASE

In 1981, the Secretary of the Interior issued Petitioner, Paul C. Kohlman, an oil and gas lease pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1982). The Petitioner's lease and eighteen other leases are located in the Deep Creek Further Planning Area of the Lewis and Clark National Forest in Montana. "Further planning" means that the Forest Service had studied the area for possible inclusion in the National Wilderness System, 16 U.S.C. §§ 1131-1136 (1982), but had neither recommended it for designation, nor recommended it as non-suitable for wilderness.

Accordingly, the leases contained a "Further Planning Area Stipulation" which states that Congress may ultimately designate the area wilderness. In that event, the leases would be subject to the wilderness legislation. The leases also contained a "Threatened or Endangered Species Stipulation" that could restrict or disallow future activities that violate the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982). Apart from these two stipulations, which would allow the government or Congress to preclude development in certain circumstances, the leases include no general stipulation which would allow the government discretion to completely preclude exploration.

Prior to issuance of the leases, the Forest Service completed an Environmental Assessment (EA)[2] pursuant to NEPA. The EA described impact that the public might expect if intensive future exploration activities took place in the Deep Creek area. However, the EA concluded that the government need not produce an Environmental Impact Statement (EIS)[3] because the issuance of the leases was a paper transaction that did not, in itself, authorize any environmental disturbance. Since there was no environmental disturbance proposed, the action did not reach the threshold of "significance" required to trigger an EIS. *See* 42 U.S.C. § 4332(2)(C) (1982), App. 42-43.

When a lessee actually proposed future disturbance such as drilling, development, or production; the government would undertake further environmental review

---

[2] "Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible which serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

40 C.F.R. § 1508.9 (1987).

[3] " 'Environmental impact statement' means a detailed written statement as required by [NEPA] section 102(2)(C) [42 U.S.C. § 4332(2)(C) (1982), App. 42-43]" 40 C.F.R. § 1508.11 (1987).

pursuant to NEPA. At that time, the site specific information necessary for environmental documentation would be available. Staged environmental review would parallel stages of exploration and development proposed by the lessee.

The government undertook a similar staged review to comply with the consultation requirements of the Endangered Species Act, 16 U.S.C. § 1536 (1982), App. 44-46. As with the NEPA review, it restricted the biological opinion to paper issuance of the lease. The opinion concluded that without site specific proposals, the government had insufficient information to render an opinion on anything beyond the leasing phase.

The Forest Service considers area-wide uses for National Forest lands in Forest Land and Resource Management Plans. *See* National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1982). The uses it considers include the oil and gas production, wilderness, recreation, and endangered species values that allegedly conflict in this case. The Forest Service completed a Forest Plan during the pendency of this litigation.[4] The Petitioner raised the issue of completion of the plan in briefing, but the Court of Appeals did not address it.

Litigation began when the Respondents challenged the issuance of the leases on the basis that the Forest Service had failed to complete an EIS and comprehensive

---

[4] Prior to the new plan, "Multiple Use Plans" completed by forest ranger districts were in effect.

biological opinion covering all possible future exploration, development, and production activity. The Respondents also raised several other issues which the Petitioner has not appealed. The Forest Service upheld lease issuance on administrative appeal. The Respondents then appealed to the United States District Court for the District of Montana. The District Court ruled in favor of the Respondents on the issues raised in this Petition. *Bob Marshall Alliance v. Watt*, No. 82-015-GF (D. Mont., App. 20. The Ninth Circuit Court of Appeals upheld the district court. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), App. 1.

REASONS FOR GRANTING THE WRIT

Bob Marshall and the closely related *Conner* case are the most important cases in onshore federal oil and gas development today. They have spawned speeches, articles, and seminars throughout the public land states. They are among the environmental groups' greatest victories, and among federal lessees greatest defeats.

I. IN *BOB MARSHALL*, THE NINTH CIRCUIT REJECTED LONG ESTABLISHED NEPA REVIEW PROCEDURES UPHELD BY THE TENTH CIRCUIT IN *PARK COUNTY*

A. The Circuits Are in Conflict over the Need for a Leasing EIS

The issue these cases present is as follows: when must the government prepare an EIS that considers the environmental impact of development of an oil or gas field? Is that time at issuance of a lease, when the oil or

gas field is not much more than a gleam in the eye of an imaginative geologist and there is a whole national forest to explore? Or, is that time when a wildcatter drills the first well? Or, finally, is that time when an oil company actually discovers oil or gas?

In *Bob Marshall* the Ninth Circuit held that the time for an EIS was the gleam in the eye stage, when the government issued the lease. The court relied on *Conner* to hold that lease issuance violated NEPA because the government failed to prepare a comprehensive EIS addressing the impact of possible future exploration and development scenarios. 852 F.2d at 1227, App. 11; *Conner* 848 F.2d at 1450. The *Conner* court expressed its holding as follows:

> Appellants also complain that the uncertain and speculative nature of oil exploration makes preparation of an EIS untenable until lessees present precise site-specific proposals for development. The government's inability to fully ascertain the precise extent of the effects of mineral leasing in a national forest is not, however, a justification for failing to estimate what those effects might be before irrevocably committing to the activity.

848 F.2d at 1450.[5]

This holding is squarely at odds with *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987). As in *Bob Marshall* and *Conner*, the oil and gas lease in question was a raw exploration play. As in *Bob Marshall*, the *Park County* "plaintiffs argue[d] that an EIS must be prepared at the leasing stage because of

---

[5] Sun Petition at A-18.

the eventual cumulative and foreseeable effects of exploratory drilling and then full field development." 817 F.2d at 622.[6] Despite the similarities, the *Park County* court responded very differently: "We merely hold that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry." 817 F.2d at 623.[7]

The *Park County* court went on to explain its decision:

> When BLM [United States Bureau of Land Management] is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD [Application for a Permit to Drill] is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken. Only then can BLM determine whether a river system is implicated, where access will be needed and how it should be accomplished, and which wildlife is affected. In short, the specificity that NEPA requires is simply not possible absent concrete proposals.

Park County, 817 F.2d at 624[8] The court found that NEPA did not require the government to produce a "boilerplate EIS" that "would not measurably improve decision-making process." *Id.*

Thus the two circuits considered virtually identical fact situations and the same practical constraints on the availability of site specific information. Nevertheless,

---

[6] Sun Petition at D-23.

[7] Sun Petition at D-25.

[8] Sun Petition at D-26.

they came to exactly opposite conclusions. The Ninth Circuit requires an EIS for oil and gas lease issuance, while the Tenth Circuit does not.[9]

The EIS requirement is more than minor or routine procedure. Even production of a "boilerplate" EIS requires large amounts of time and money. Preparation of this document for leases that will probably never produce or be drilled is a severe impediment to making a leasing decision.

B. Segmented Decision-Making Is a Result of the Split between Circuits, Not a Way Around the Split

In *Park County*, the Tenth Circuit reasoned that because an EIS produced at the leasing stage would be useless, NEPA did not require it. 817 F.2d at 624. It ended its analysis there. On the other hand, the Ninth Circuit in *Conner* and *Bob Marshall* apparently skipped any consideration of EIS usefulness. The Ninth Circuit did not take issue with the government's and lessees' argument that lack of site specific information made a useful EIS impossible. *Conner*, 848 F.2d at 1451.[10] Instead, it offered a segmented decision-making process as an

---

[9] The further confusion in this area of the law is revealed by the fact that the *Park County* court relied on a District of Columbia Circuit case, *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982), while the *Conner* court relied on another District of Columbia Circuit case, *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

[10] Sun Petition at A-19.

alternative to doing an EIS. 852 F.2d at 1227-8, App. 11; *Conner*, 848 F.2d at 1449-50.[11]

Under this procedure, the Ninth Circuit found that the government could issue the lease without an EIS; but it must retain the right to prohibit all surface disturbing activity. *Id.* Future decisions would allow or disallow surface disturbing actions, and EISs must accompany those decisions. In effect, each time the lessee applied for a permit he would risk losing his lease. Interest groups who opposed development could subject lessees to multiple political battles as they proceeded through the various stages of development.

The Ninth Circuit's solution to the NEPA problem is premature. NEPA was not intended to produce boilerplate documents that serve no purpose. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 557-8 (1978) (Only substantial defects in NEPA compliance are grounds to set aside decisions). If the Tenth Circuit's holding that NEPA does not require a useless EIS is correct; then NEPA does not require the Ninth Circuit's segmented decision-making as a substitute for the useless EIS.

II. IN *BOB MARSHALL*, THE NINTH CIRCUIT REJECTED LONG ESTABLISHED ESA REVIEW PROCEDURES UPHELD BY NUMEROUS CIRCUIT COURT DECISIONS

The biological opinion requirement of the ESA, 16 U.S.C. § 1536(b)(3)(A), App. 44-45, is analogous to the EIS

---

[11] Sun Petition at A-16 to A-17.

requirement of NEPA. It is to inform decision-makers of the impacts on endangered species. As with EAs and EISs produced under NEPA, the federal government has not required biological opinions to consider speculative unproposed future actions. The reasons are the same. The government and lessees simply have no knowledge of the location, scope, nature, or even whether activities will take place. Therefore, the government cannot make any useful estimates of the impact on endangered species.

Circuit Courts of Appeals have upheld staged review under ESA in *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), *aff'g*, 613 F. Supp. 1182, 1188 (D. Wyo. 1985); *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 680 (D.C. Cir. 1982); *North Slope Borough v. Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980); and, *Village of False Pass v. Clark*, 733 F.2d 605, 607 (9th Cir. 1984). *See also Conner v. Burford*, 648 F.2d 1441, 1462-4 (9th Cir. 1988) (Wallace, J. dissenting) (Conflict within Ninth Circuit).[12] The Ninth Circuit rejected staged ESA review in *Conner* and *Bob Marshall* for the same reasons that it rejected staged NEPA review in those cases. 852 F.2d at 1228, App. 12-13; *Conner*, 848 F.2d at 1454.[13]

The conflict among circuits is even more pronounced for ESA than for NEPA. The reasons for granting the writ to resolve this conflict are equally compelling.

---

[12] Sun Petition at A-45 to A-48.

[13] Sun Petition at A-25 to A-26.

III. CONTINUATION OF THE SPLIT IN THE CIRCUITS WILL ALLOW SPECIAL INTEREST GROUPS TO VETO ISSUANCE OF FEDERAL OIL AND GAS LEASES

A. Practical Constraints Will Allow Anyone with a Lawyer to Stop Mineral Development on the Public Lands

As the Tenth Circuit pointed out in *Park County*, the federal government simply does not have the resources to do EISs for the thousands of oil and gas leases issued each year. In 1984, the government issued 5,478 leases; but for all activities, the Department of the Interior did only 115 EISs. 817 F.2d at 623. If the new EISs are to have any substantive content at all, then a drastic shift in resources in the Department of the Interior must take place. Under present budget constraints this is not realistic.

Recent experience has shown that in the absence of clear judicial direction, the government will not do EISs; but instead, it will continue with lease sales and wait for third party environmental groups to protest. Protests have been forthcoming in Montana, Utah, and Colorado. Threats of litigation based on faulty fulfillment of NEPA and ESA review for speculative future development scenarios has caused the government to withdraw leases or lease sales.[14] Groups in Montana have undertaken negotiations with the federal government to reach a solution

---

[14] Environmental groups in Colorado and Utah may sue in the District of Columbia Circuit and attempt to rely on *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), to demand and EIS and thereby bypass the Tenth Circuit.

favorable to their interests in stopping leasing. By caving-in to special interest group demands, the government may avoid litigation and the cost of EISs. But the leasing program is crippled and the nation looses necessary oil and gas reserves.

Like waste disposal, construction of power plants, and other kinds of development necessary to our society; anyone who can afford to hire a lawyer will be able to stop oil and gas development on federal lands.

Staged review is based on the inherent uncertainties of geological exploration. It allows low cost decision-making where the existence of resources is uncertain. By upsetting this long-standing scheme, the *Conner* and *Bob Marshall* decisions place other types of geological exploration on the public lands in jeopardy. For example, under *Conner*, speculative mining exploration may require preparation of an EIS considering complete development of a mine. This huge front end cost for environmental documentation will kill most ventures before they get started. Neighbors or special interest groups could say no to exploration, and thus prohibit future development.

B. The Decision Replaces a Logical and Comprehensive Land Use Planning System with a Fragmented One Suited to Special Interests

The federal government has instituted a comprehensive planning system for federal lands. 16 U.S.C. §§ 1600-1614 (1982); 43 U.S.C. §§ 1711-1722 (1982). Land use plans anticipate broad conflicts such as those that the government might document in the EISs and biological

opinions required by the Ninth Circuit in *Bob Marshall*. The plans inventory resources such as wildlife and recreational values, and make recommendations to protect those resources. Withdrawal from mineral leasing is among the possible recommendations and actions where mineral development is incompatible with valuable surface resources. An EIS accompanies each plan.

The planning system recognizes that land managers can see surface resources, and thus it concentrates on protecting those resources. The land managers cannot see geological resources, so plans cannot describe them in detail. Nevertheless, land managers consider potential impacts of mineral development when they develop protective measures for surface resources. 36 C.F.R. § 219.22 (1988). Where the plans do not find irreconcilable conflicts between surface and subsurface resources, the principle of multiple use prevails, and the land remains available for mineral development. *See* 16 U.S.C. §§ 528-531 (1982) (Multiple Use and Sustained Yield Act).

The holdings in *Conner* and *Bob Marshall* overturn the present logical system and replace it with one that gives special interest groups great power. Under the Ninth Circuit decisions, the mineral developer or government leasing agency proposes leasing or development; then those interested in surface resources react by stating whether they think surface values outweigh mineral values. Special interest groups may argue that the government should deny the activity or revoke the leases. The result is a series of political and administrative land use battles outside of the established land use planning process. The comprehensive approach set up by Congress is shattered. *See* 16 U.S.C. § 1600(3) (1982) (Congress finds

that coordinated approach to resource planning serves the national interest).

The Court's consideration of a conflict between development of the public lands and Indian religious sites in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, ___ U.S. ___, 108A S.Ct. 1319 (1988), presented a similar situation. At oral argument, counsel for the Cemetery Association was asked if Indians could identify religious sites prior to development proposals. Counsel responded that the developer should first state the proposed development's location, then Indian groups would come forth with the religious significance of the land and whether they thought development was compatible. The Court rejected this impractical scheme, and it should reject the equally impractical counterpart here applied to environmental concerns.

IV. ABSENCE OF THE GOVERNMENT IS NOT DISPOSITIVE OF THE CERT-WORTHINESS OF THIS PETITION

When it issues oil and gas leases on the public lands, the government has multiple obligations. It must protect the environment, but it also has a mandate to develop resources. Often, as in this case, those obligations conflict. In such cases, the government can either resolve the conflict, or avoid it by doing more studies.

The government cannot be an advocate for the lessees, or even an advocate for resource development. It actually represents a set of procedures for issuing leases.

The Respondents brought this case to argue that the government should adopt a different set of procedures.

The Respondents believed that more study of the conflict, that is more and bigger EISs, would result in a different decision; one that was more favorable to them.

The government is in the business of producing the studies, and the Respondents have demanded more of its product. Nevertheless, the government argued against more studies in the D.C. Circuit, the Ninth Circuit, and Tenth Circuit. Ultimately, if the government looses this case, then it must adopt new procedures that will require more study of the conflict. The only certainty is that the new procedures will be more burdensome and lead to decisions more favorable to the Respondents.

On the other hand, the Petitioner will likely loose his lease. The industry, and in particular independent oilmen like the Petitioner, will not be able to lease lands essential to the continuation of their businesses. The nation will lose essential oil and gas reserves.

Our system of government has reached a point where every time an individual or group does not like the substance of a government decision, they go to court to ask for more procedure and more studies to accompany the decision. No matter that the demanded procedure does not comport with geological reality or only produces useless boilerplate EISs. In many situations, we are reaching a point where the cost of making a decision is greater than the value of the decision itself. Those who oppose a decision can win by raising the cost of decision-making so high that the government cannot afford to make the decision.

The federal administrative and political systems have proven to be poor guardians against this destructive trend. For each controversial problem, the solution seems to be more government studies. The theoretical arguments that conflicts require more study appeal to politicians who wish to placate all sides, and to the administrators who will produce the studies. The cost to the nation has been substantial.

This is a case where the courts, rather than the Administration or Congress, have asked for more studies. It should be no surprise that it has produced tremendous internal conflict in the political and administrative machinery that determines whether the government files a petition for a writ of certiorari.[15] The Petitioner respectfully submits that, even if the government does not wish petition, now is the time for the Court to act in the interest of the nation and put an end to one example of useless and dilatory procedure.

---

[15] The government requested an extension of time so that it had a total of four months to make the decision to petition. The Petitioner learned of the government's negative decision only during the final preparation of this petition.

CONCLUSION

The Ninth Circuit Court of Appeals would reshape the oil and gas leasing system on public lands. In support of the drastic move, it cites an eighteen year old statute designed to provide decision-makers with environmental documentation. Yet eighteen years ago, Congress wrote that NEPA was not to amend the substantive obligations of government agencies. 42 U.S.C. § 4334 (1982), App. 43. Now, in the Ninth Circuit, the long established procedures for issuance of oil and gas leases that have been upheld in the Tenth Circuit Court of Appeals are no longer good enough.

No doubt, the government can re-adjust to the new regime. All that is necessary is to recognize the requests of special interest groups. One may rationalize that such an outcome is not so bad. After all, public input is an important part of modern decision-making. But, as a practical matter, the process left in place by conflicting circuit court opinions leaves one more essential element of our economy to the whim of someone who would hire a lawyer to stop it.

The Court should exercise its supervisory authority to resolve the conflict of authority between the Circuits and to bring environmental review procedures back within the intent of NEPA and ESA. NEPA and ESA only require documents that are a practical aid to decision-making.

Respectfully submitted,

ERIC TWELKER
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264

WILLIAM H. COLDIRON
Counsel of Record
Gough, Shanahan, Johnson & Waterman
301 First National Bank Building
Helena, Montana 59624

November 29, 1988

APPENDIX A

BOB MARSHALL ALLIANCE, et al., *Plaintiffs-Appellees,* v. DONALD P. HODEL, SECRETARY OF THE INTERIOR,* et al., *Defendants,* and PLACID OIL COMPANY, *Defendant-Intervenor,* and PAUL C. KOHLMAN and ANN E. KOHLMAN, *Defendants-Appellants.*	No. 86-4019 D.C. No. CV 82-15-GF OPINION

Appeal from the United States District Court
for the District of Montana

Paul G. Hatfield, District Judge, Presiding

Argued August 6, 1987–Seattle, Washington
Submitted June 16, 1988

Filed August 1, 1988

Before: William C. Canby, Jr., Stephen Reinhardt
and Robert R. Beezer, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Environmental Law

Appeal from a judgment finding that the defendant agencies violated NEPA and the ESA. Affirmed in part, reversed in part and remanded. The court held that NEPA was violated by (1) issuing a non-NSO lease without an EIS preparation; (2) issuing any leases at all without adequate consideration of the no action alternative; and (3) ESA was violated by issuing leases without preparation of a biological opinion assessing effect of leasing and post-leasing activities on endangered species in the area.

An area in Montana known as Deep Creek is an important refuge for threatened or endangered species. The Forest Service prepared an environmental assessment of Deep Creek and concluded that oil and gas leasing would have no significant effect on the quality of the human environment. This FONSI absolved the agencies of the need to prepare an environmental impact statement (EIS) on the sale of the leases. Regarding the Endangered Species Act (ESA), the biological opinion concluded that the sale of leases in itself would not threaten the species in question, but found that there was insufficient information available to issue a comprehensive biological opinion beyond the initial leasing phase. Eventually oil and gas leases were issued. Some contained "no surface occupancy" (NSO) stipulations, others imposed reasonable conditions on surface-disturbing activity. All contained threatened or endangered species

stipulations. Appellees the Bob Marshall Alliance challenged the leases. The district court awarded summary judgment for Marshall Alliance finding that the agencies violated NEPA, Forest Service regulations, and the ESA.

[1] Regarding the NEPA claims, this court held in *Conner v. Burford,* 836 F.2d 1521, that non-NSO leases cannot be sold without preparation of an EIS because non-NSO leases represent an irretrievable commitment of resources. [2] The ESA requires the Fish and Wildlife Service(FWS) to consider all phases of the agency action in its biological opinion. Staged consultation is not sufficient to comply with the ESA and stipulations in the leases cannot substitute for comprehensive biological opinions. [3] In this case, the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases. The district court's judgment is reversed insofar as it requires preparation of an EIS for the sale of NSO leases. [4] This court cannot determine from the record which of the Deep Creek leases protect absolutely against surface-disturbing activity. On remand, the district court may need to determine which of the Deep Creek leases are NSO leases. [5] Because the Deep Creek leases were issued without preparation of a comprehensive biological opinion, the ESA was violated.

[6] This court answers affirmatively the only question raised by the agencies' contentions on appeal: whether the no action alternative should have been considered before the NSO leases were issued. [7] Because the Deep Creek lease sale opens the door to potentially harmful post-leasing activity, it involves unresolved conflicts concerning alternative uses of available resources; NEPA therefore requires that alternatives–including the

no-leasing option–be given full and meaningful consideration.

COUNSEL

J. Carol Williams, United States Department of Justice, Washington, D.C., for the defendants-appellants.

Constance E. Brooks, Mountain States Legal Foundation, Denver, Colorado, for the defendant-appellant Paul C. Kohlman.

Stephan C. Volker, Sierra Club Legal Defense Fund, San Francisco, California, for the plaintiffs-appellees.

OPINION

REINHARDT, Circuit Judge:

This appeal involves the issuance of oil and gas leases on the area known as Deep Creek, located in Montana's Lewis and Clark National Forest. The Bob Marshall Alliance and the Wilderness Society (collectively "Marshall Alliance") brought suit against several federal agencies and the lessees,[1] challenging issuance of the leases on several statutory grounds.

First, Marshall Alliance alleges that issuance of the leases violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1982). NEPA mandates the preparation of an environmental impact

statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). In order to determine whether an EIS is required, the federal agency concerned prepares an environmental assessment. 40 C.F.R. § 1508.9 (1987). Based on that assessment the agency may conclude that the action will not significantly affect the environment and issue a "Finding of No Significant Impact" ("FONSI") in lieu of an EIS. *Id.* § 1508.13. We have held that an EIS is required at the point where a federal agency makes an "irreversible and irretrievable commitment of the availability of resources." *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979). Marshall Alliance contends that, because the leases in question here were issued without an EIS, the requirements of NEPA were not met.

Second, NEPA also requires that federal agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982); *see* 40 C.F.R. § 1508.9(b) (1987) (environmental assessment must include discussion of alternatives). Marshall Alliance contends that the alternative of not issuing the Deep Creek leases – the "no action alternative" – was not considered adequately, in violation of NEPA's mandate.

Marshall Alliance's third claim involves the Endangered Species Act of 1973 (the "ESA"), 16 U.S.C. §§ 1531 *et seq.* (1982). The ESA establishes a consultation process

---

[1] One of the lessees, Paul C. Kohlman, remains a party to this appeal.

by which federal agencies ensure that their actions will not jeopardize a threatened or endangered species or damage the habitat of such a species. *Id.* § 1536(a)(2). The statute requires preparation of a biological opinion based on "the best scientific and commercial data available" whenever a threatened or endangered species is present in the area of a proposed action. *Id.* §§ 1536(a)(2), (b). If the opinion concludes that the action would jeopardize a protected species, the action must be modified. *Id.* Marshall Alliance alleges that the requirements of the ESA were not met before the Deep Creek leases were issued.

Following our recent opinion in *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988), we hold that the defendant agencies violated the provisions of both NEPA and the ESA.

FACTS AND PROCEEDINGS BELOW

The Deep Creek Further Planning Area ("Deep Creek") comprises about 42,000 acres of wild, mountainous terrain. It is bounded to the west by three designated wilderness areas and to the east by three wilderness study areas. Deep Creek offers spectacular scenery and recreational opportunities for fishers, hikers, and outdoors enthusiasts of all kinds. Perhaps most important, it is home to a large and unique wildlife population. Deep Creek is an important refuge for four threatened or endangered species: the grizzly bear, the gray wolf, the peregrine falcon, and the bald eagle.[2] In

---

[2] Appellees claim that Deep Creek, together with the contiguous wilderness areas, contains a substantial portion of the entire grizzly bear population of the lower 48 states.

addition, bighorn sheep, elk, mule and white-tailed deer, black bear, moose, mountain goat and mountain lion abound in the area. At the same time, Deep Creek offers opportunities for resource developers. The area is located in the Overthrust Belt, an extensive geologic zone in which major discoveries of oil and natural gas have already been made.

In 1977, the United States Forest Service began reviewing national forest lands to determine which areas should be recommended for wilderness designation. Through this Roadless Area Review and Evaluation ("RARE II") process, the Forest Service classified areas as either wilderness, nonwilderness, or further planning. Those lands classified as further planning areas are open for all uses permitted under applicable land use plans–including oil and gas exploration–pending the development of management plans which will consider whether to recommend the area for inclusion in the wilderness system. *See California v. Block,* 690 F.2d 753, 758 (9th Cir. 1982). In order to preserve the possibility of wilderness designation, the final RARE II environmental impact statement declared that development activities that might reduce the land's wilderness potential are prohibited in further planning areas.

The RARE II evaluation awarded Deep Creek the highest possible wilderness rating–a "perfect score" on the Wilderness Attribute Rating System. Deep Creek also received a very high rating on its potential for natural gas discovery. Because Deep Creek possesses both highly favorable wilderness characteristics and a high potential for the development of natural gas resources, it was classified as a further planning area.

Following this designation, the Bureau of Land Management ("BLM") of the Interior Department received sixteen applications for oil and gas leases on Deep Creek. The Forest Service prepared an environmental assessment of Deep Creek and concluded that such leasing would have no significant effect on the quality of the human environment. This FONSI absolved the agencies of the need to prepare an EIS on the sale of the leases. With regard to the requirements of the ESA, the Forest Service requested formal consultation with the Fish and Wildlife Service ("FWS") regarding the effects of the lease issuance on the threatened and endangered species in Deep Creek. The biological opinion issued by FWS concluded that the sale of leases in itself would not threaten the species in question, but found that there was insufficient information available to issue a comprehensive biological opinion beyond the initial leasing phase.

Beginning in January 1982, BLM issued the sixteen leases for which applications had been received; subsequently BLM issued three simultaneous oil and gas leases by lottery. Collectively these leases cover all of the land within Deep Creek. Some of the leases contain "no surface occupancy" ("NSO") stipulations, which prohibit the lessee from engaging in any surface-disturbing activity. Others contain various stipulations that allow the Secretary of the Interior to impose reasonable conditions on surface-disturbing activity. All of the leases contain "threatened or endangered species stipulations," which state that surface-disturbing activity may be restricted if it would have a detrimental effect on endangered or threatened species or their habitats.

In February 1982, following a series of administrative appeals, Marshall Alliance brought this action in federal district court to challenge the issuance of the Deep Creek leases. Specifically, Marshall Alliance alleged that NEPA required preparation of an EIS prior to the issuance of the leases; that the defendant agencies failed to consider the alternative of not issuing leases, again in violation of NEPA; that the leases would impair the wilderness character of Deep Creek in violation of Forest Service regulations; and that the consultation process mandated by the ESA had not taken place.

The district court awarded summary judgment for Marshall Alliance. The court held that the agencies violated NEPA and Forest Service regulations by failing to prepare an EIS for the Deep Creek lease, and that the stipulations (both NSO and non-NSO) were insufficient to comply with NEPA's mandate. The court also held that the agencies violated NEPA by failing to give meaningful consideration to the noleasing alternative. Finally, the court held that the effects of leasing on threatened and endangered species in Deep Creek had not been properly assessed, as the ESA requires. The court set aside the actions of the agencies in issuing the leases and enjoined the agencies from issuing any leases on Deep Creek pending compliance with NEPA, the ESA, and agency regulations.

The defendants appeal from the district court's decision. They contend that both NEPA and the ESA are satisfied by a process of "staged consultation" under which the effects of surface-disturbing activity are analyzed as specific activities are actually proposed. They

argue that ongoing NEPA evaluation and ESA consultation, combined with the various stipulations in the leases, will protect environmental interests as fully as the two statutes require.

DISCUSSION

I. The Decision in *Conner*

Some of the issues raised in this appeal are disposed of by our recent opinion in *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988). That case also involved the sale of oil and gas leases on national forest lands in Montana. As in the instant case, the leases were issued without preparation of an EIS. Some of the leases contained NSO stipulations and some did not. Again as in the instant case, a comprehensive biological opinion was not prepared prior to issuing the leases. The plaintiffs challenged the lease sale, claiming violations of NEPA and the ESA.

[1] On the NEPA claims, we held that the sale of an "NSO lease" – defined as a lease that "absolutely forbid[s] the lessee from occupying or using the surface of the leased land unless a modification of the NSO stipulation is specifically approved by the BLM" – does *not* constitute the "go/no go point of commitment at which an EIS is required." *Id.* at 1527-29. However, we held that "non-NSO leases" – that is, leases which "do not reserve to the government the absolute right to prevent all surface-disturbing activity" – cannot be sold without preparation of an EIS, because non-NSO leases represent an irretrievable commitment of resources. *Id.* at 1529-32.

[2] With regard to the ESA claims, we held that the ESA requires the FWS to consider *all* phases of the agency action – including post-leasing activities as well as the lease sale itself – in its biological opinion. Incomplete information, we stated, "does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available." *Id.* at 1534. The FWS "violated the ESA by failing to use the best information available to prepare comprehensive biological opinions considering all stages of the agency action." *Id.* at 1535. We further held that staged consultation was not sufficient to comply with the ESA and that stipulations in the leases could not substitute for comprehensive biological opinions. *Id.* at 1535-38.

II. Preparation of an EIS

[3] It is clear from our decision in *Conner* that sale of the Deep Creek leases required preparation of an EIS unless the lease "absolutely prohibits surface disturbance in the absence of specific government approval." *Id.* at 1527 n.15; *see also Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). No EIS was prepared on any of the leases. Following *Conner*, we affirm the district court's holding that the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases, and reverse the district court's judgment insofar as it requires preparation of an EIS for the sale of NSO leases.

[4] As in *Conner*, we cannot determine from the record which of the Deep Creek leases protect absolutely against surface-disturbing activity. Four of the leases apparently contain NSO stipulations covering the entire

leased acreage; some of the others contain NSO stipulations covering part of the leased acreage; some leases contain both NSO stipulations and less strict stipulations regarding regulation of surface-disturbing activity. On remand, the district court may need to determine which of the Deep Creek leases are NSO leases – that is, leases in which "the language of the stipulation, construed with the rest of the lease, absolutely prohibits surface disturbance in the absence of specific government approval." *Conner*, 836 F.2d at 1527 n.15.[3]

III. The ESA Claims

[5] As in *Conner*, the Deep Creek leases were issued without preparation of a comprehensive biological opinion as to the effects of the leases *and* of all post-leasing activities on threatened and endangered species. This violated the ESA. The threatened and endangered species stipulations in the leases "cannot be substituted for comprehensive biological opinions." *Id.* at 1538. We therefore affirm the district court's decision that the defendant agencies violated the ESA, and hold that the statute

---

[3] Marshall Alliance contends that the NSO stipulations in the Deep Creek leases were conditioned on the fact that the surrounding lands were leased for surface occupancy and directional drilling was therefore possible. The Alliance argues that the NSO stipulations affect only that portion of the leased land that lies within a half-mile of areas where directional drilling would be allowed and that, if surface occupancy is disallowed on the surrounding lands, the NSO stipulations are completely ineffective. We leave this issue, which involves construction of the leases and the language of the stipulations, for the district court's consideration.

requires the FWS to prepare a biological opinion assessing the impact of the issuance of the Deep Creek leases and of all post-leasing activities on threatened and endangered species.

IV. The No Action Alternative

Finally, Marshall Alliance argues that the defendant agencies violated NEPA by failing to give adequate consideration to the no action alternative – that is, the option of not issuing any oil and gas leases on Deep Creek. The Alliance contends that the agencies abandoned the no action alternative because they believed that declining to issue the leases based on wilderness considerations alone would violate the Wilderness Act, 16 U.S.C. §§ 1131 *et seq.* (1982), and further argues that the agencies' construction of the law is erroneous. Because the agencies themselves have not raised this argument on appeal, we need not consider it here.

[6] Nor do the agencies contend on appeal that they considered the no action alternative. Rather, they argue that because the NSO stipulations preclude any surface-disturbing activity on Deep Creek, the NSO leases do not create any "unresolved conflicts" that would trigger NEPA's consideration of alternatives requirement. We observe that the agencies have apparently abandoned any contention that issuance of non-NSO leases does not require consideration of the no action alternative. Thus, only one question is raised by the agencies' contentions on appeal: whether the no action alternative should have been considered before the NSO leases were issued. We answer that question in the affirmative.

NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions "involve[] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982). The goal of the statute is to ensure "that federal agencies infuse in project planning a thorough consideration of environmental values." *Conner,* 836 F.2d at 1532. The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers "[have] before [them] and take[] into proper account all possible approaches to a particular project (*including total abandonment of the project*) which would alter the environmental impact and the cost-benefit balance." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission,* 449 F.2d 1109, 1114 (D.C. Cir. 1971) (emphasis added). NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place. *Id.* Informed and meaningful consideration of alternatives – including the no action alternative – is thus an integral part of the statutory scheme.

Moreover, consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. *See id.*§ 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is

of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement. *See City of New York v. United States Department of Transportation*, 715 F.2d 732, 742 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974); *California v. Bergland*, 483 F. Supp. 465, 488 (E.D.Cal. 1980), *aff'd sub nom. California v. Block*, 690 F.2d 753 (9th Cir. 1982). In short, any proposed federal action involving unresolved conflicts as to the proper use of resources triggers NEPA's consideration of alternatives requirement, whether or not an EIS is also required.

[7] Issuance of the Deep Creek leases involves such conflicts. Indeed, this case presents a useful illustration of the need for an independent consideration of alternatives requirement. The Deep Creek NSO leases do not represent an irretrievable commitment of resources, and therefore their sale does not require preparation of an EIS. *Conner*, 836 F.2d at 1529. Nevertheless, the sale of Deep Creek leases – both NSO *and* non-NSO – involves conflicts as to the present and future uses of Deep Creek, because the issuance of the leases may allow or lead to other activities that would affect Deep Creek's suitability for wilderness designation. As we made clear in *Conner*, the sale of leases cannot be divorced from post-leasing

exploration, development, and production. *Id.* at 1534; *cf. Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) (EIS must consider cumulative environmental effects of agency action). Because the Deep Creek lease sale opens the door to potentially harmful post-leasing activity, it "involves unresolved conflicts concerning alternative uses of available resources"; NEPA therefore requires that alternatives – including the no-leasing option – be given full and meaningful consideration.[4]

While the defendant agencies do not argue that the no action alternative was weighed by the Forest Service, defendant Kohlman asserts that such consideration was in fact afforded to the full extent required by NEPA. Kohlman argues that if the agencies had either denied or deferred action on the Deep Creek lease applications, their action would have constituted an illegal administrative "withdrawal" of Deep Creek from mineral leasing.[5] Therefore, he contends, further consideration of these options was not required. We reject this argument. "Withdrawal" of public lands requires a formal procedure which, for parcels exceeding 5000 acres, includes

---

[4] We observe that, by definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate becomes ineffective.

[5] The Forest Service apparently was of the same view with regard to deferring action on the lease applications. The alternative of denying all leases was rejected as "unviable" on other grounds not raised by the appellants. United States Forest Service, *Environmental Assessment – Oil and Gas Leasing: Deep Creek & Reservoir North Rare II Further Planning Areas* 46-47 (rev. Jan. 1981).

congressional approval; the land is effectively segregated from the operation of public land laws for a period of up to 20 years. Federal Land Policy and Management Act, 43 U.S.C. § 1714 (1982). We fail to see how a decision not to issue oil and gas leases on Deep Creek would be equivalent to a formal withdrawal. Kohlman cites only one case, *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D.Wyo. 1980), as authority for the proposition that deferring action on oil and gas lease applications can constitute an unlawful administrative withdrawal. *Mountain States* is not binding on us and we do not find its reasoning persuasive. In that case, the court concluded that the Interior and Agriculture Departments had illegally withdrawn over a million acres of land because they had failed to act on oil and gas lease applications and had thereby removed the land from the operation of the Mineral Leasing Act of 1920. *Id.* at 391. Yet as the court acknowledged, the Mineral Leasing Act gives the Interior Secretary discretion to determine which lands are to be leased under the statute. 30 U.S.C. § 226(a) (1982); *see Mountain States*, 499 F.Supp. at 391-92. We have held that the Mineral Leasing Act "allows the Secretary to lease such lands, but does not require him to do so. . . . [T]he Secretary has discretion to refuse to issue any lease at all on a given tract." *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975) (citing *Udall v. Tallman*, 380 U.S. 1, 4 (1965)), *cert. denied*, 425 U.S. 973 (1976). Thus refusing to issue the Deep Creek leases, far from removing Deep Creek from the operation of the mineral leasing law, would constitute a legitimate exercise of the discretion granted to the Interior Secretary under that statute. We affirm the district court's holding that the agencies failed to give the no action alternative meaningful consideration and thereby violated NEPA.

CONCLUSION

The defendant agencies violated NEPA by issuing non-NSO leases on Deep Creek without preparation of an EIS, and by issuing any leases at all on Deep Creek without adequate consideration of the no action alternative. They violated the ESA by issuing the leases without preparation of a comprehensive biological opinion which assesses the effects of leasing and post-leasing activities on threatened and endangered species in the Deep Creek area.

The proper remedy for substantial procedural violations of NEPA and the ESA is an injunction. *Thomas,* 753 F.2d at 764. The district court's opinion declared that "the actions of the defendant agencies, allowing the issuance of oil and gas leases in the Deep Creek Area, are HEREBY SET ASIDE. The defendant agencies are enjoined from making further recommendations to lease and issuing leases pending compliance with NEPA, agency regulations, and the ESA." The parties have raised some question as to the effect and appropriateness of the district court's order. In *Conner,* we found similar language to be unclear and undertook to clarify the order. 836 F.2d at 1541. Here we face an additional factor not present in *Conner,* namely the agencies' failure to consider the no action alternative. Under these circumstances we prefer to remand the action and allow the district court the first opportunity to clarify its order and to determine the specific steps to be taken with respect to the various Deep Creek leases. In doing so, the district court shall consider our decisions in this case and in *Conner,* as well as our recent opinions in *Northern Cheyenne Tribe v. Hodel,* 842 F.2d 224 (9th Cir. 1988), and *Save the Yaak Committee v. Block,* 840 F.2d 714 (9th Cir. 1988).

Pending the district court's clarification of its order, we enjoin all activities on Deep Creek lands conducted under the provisions of the Deep Creek oil and gas leases, and enjoin the sale of any additional leases on Deep Creek, until all statutory requirements are met.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

BOB MARSHALL ALLIANCE, et al.,	)	
Plaintiffs,	)	*NO. CV-82-015-GF*
vs.	)	*MEMORANDUM*
JAMES G. WATT, et al.,	)	*AND ORDER*
Defendants.	)	

(Filed May 27, 1986)

The plaintiffs, Bob Marshall Alliance and the Wilderness Society, bring this action pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4331-4332, and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 153 *et seq.*, challenging the defendant United States Department of Interior's decision not to prepare an Environmental Impact Statement ("EIS") prior to leasing certain land within the National Forest System, *i.e.*, the Deep Creek/Reservoir North Further Planning Area ("Deep Creek Area"), for the purpose of allowing exploration for oil and natural gas. Jurisdiction over the subject matter of this controversy vests in this court pursuant to 28 U.S.C. § 1331.

The matter is presently before the court on cross-motions of the parties requesting the court to enter summary judgment in their respective favors. Because the court concludes that the decision of the defendants not to prepare an EIS was unreasonable, the court finds it appropriate to enter judgment in favor of the plaintiffs.

I. *FACTUAL BACKGROUND*

The Deep Creek Area, comprising about 42,000 acres of the Lewis and Clark National Forest, is a rugged, remote and scenically varied terrain which forms a portion of the Rocky Mountain Front. A dramatic series of deep escarpments and parallel valleys separates the Rocky Mountains from the northern high plains. Ridges within the area reach elevations of about 8,500 feet, while valley bottoms lie generally about 4,500 feet above sea level. The Area is bounded on the west by three contiguous, congressionally designated, wilderness areas, specifically the Bob Marshall, the Scapegoat and the Great Bear Wilderness Areas, which cover a combined area of approximately 1,482,000 acres. On its east side, the Deep Creek Area abuts three Bureau of Land Management wilderness study areas.

The geology of the Area offers spectacular scenery. The eastern faces of the parallel north-south trending ridges are vertical fault scarps of grey-white Madison limestone, the tops of which tower as much as 4,000 feet above the surrounding valleys. Castle Reef and Chute Mountain on Deep Creek's eastern edge, facing the Northern Plains, are visible from the prairie for dozens of miles. The area is bordered on the western side by ridges which slope deeply down to the narrow stream bottoms.

Among the numerous species of wildlife endemic to the Deep Creek Area are Rocky Mountain Bighorn sheep, elk, mule and white-tailed deer, black bear, moose, mountain goat and mountain lion. While not admitted by the Government, the plaintiffs submit that it is generally

believed that the Deep Creek Area provides critical habitat for the grizzly bear, the gray wolf, the peregrine falcon and the bald eagle, all of which are threatened or endangered species. Along with the wilderness complex it borders, the Deep Creek Area may well support a large portion of the entire grizzly population of the contiguous 48 states.

The Deep Creek Area is laced with several streams with significant sport fishery value. Those streams, which include the North and South Forks of Deep Creek, possess a pristine water quality.

Recreational use of the Deep Creek Area by local residents and permittees at nearby Forest Service cabins, commercial outfitters, visitors staying at camp grounds or camping in the back country, and visitors staying at guest ranches in the area is substantial.

The unique geological and ecological attributes of the Deep Creek Area account for the area's receiving a perfect wilderness attribute rating in the Forest Service's Roadless Area Review and Evaluation ("RARE II").[1] Nonetheless, because of the area's undetermined oil and

---

[1] Rare II was a programmatic evaluation of the 62 million acres of roadless areas in the National Forest System. Each roadless area was allocated to one of three planning categories: Wilderness, Further Planning, and Non-Wilderness. Areas allocated to the Wilderness category were recommended for inclusion in the National Wilderness Preservation System. Areas allocated to the Further Planning category are to be protected pending completion of unit management plans which would consider whether to recommend the area for Wilderness classification.

natural gas potential, the Forest Service's Rare II decision assigned the area to the Further Planning category, rather than the Wilderness category. Having been designated a Further Planning Area, Deep Creek was made available for all uses permitted under applicable land use plans, provided it was managed so as to preserve suitability for potential Wilderness designation at a later date.

Upon receiving numerous applications for oil and natural gas leases within the Deep Creek Area, the Bureau of Land Management ("BLM") requested the Forest Service to analyze the impacts of oil and gas exploration and development on the environment of the Deep Creek Area, and make recommendations concerning the propriety of allowing leases for exploratory purposes. In January of 1981, the Regional Forester of Region I of the National Forest System recommended that the BLM lease the entire acreage of the Deep Creek Area for oil and gas exploration and development. The Regional Forester's recommendation was made prior to the preparation, and without the benefit of, any EIS. The Regional Forester simply concluded that the issuance of the oil and gas leases would have no significant adverse effects on the human environment, thereby obviating the need for an EIS.

In February of 1981, the plaintiffs, pursuant to 36 C.F.R. § 211.19, appealed the Regional Forester's recommendation to the Chief of the Forest Service. The plaintiffs' appeal was denied, and the decision of no "significant impact" affirmed by the Chief of the Forest Service in May of 1981. Their administrative remedies before the Department of Agriculture exhausted, the plaintiffs filed a protest with the Montana state office of

the BLM, requesting that entity not to follow the recommendation of the Forest Service. The plaintiffs' protest, however, was dismissed by the Director of the BLM. The Secretary of the Interior, through his Assistant Secretary, affirmed the decision of the BLM Director. In January, 1981, the BLM, under authority of the Mineral Leasing Act of 1920, 30 U.S.C. § 226, began issuing leases for the purpose of oil and gas exploration within the Area. Sixteen leases have been issued for the Area.

The plaintiffs instituted the present action, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to obtain judicial review of the Secretary's decision to lease the Deep Creek Area. The plaintiffs contend the decision violates the mandates of NEPA, the mandates of the ESA, and the Forest Service's regulations regarding activity within further planning areas.

II. *ANALYSIS*

A. *Standard of Review.*

The Court of Appeals for this Circuit has consistently held that an agency's determination that a particular project does not require the preparation of an EIS is to be upheld unless unreasonable. *Foundation for North American Wild Sheep v. United States*, 681 F.2d 1172, 1177 (9th Cir. 1982); *Portela v. Pierce*, 650 F.2d 210, 213 (9th Cir. 1981); *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980). As noted by the court in *Foundation for North American Wild Sheep*, the decision to prepare an EIS is not a matter committed to the particular agency's descretion. 681 F.2d at 1177, n.24. Consequently,

the "arbitrary and capricious" standard normally applicable to reviewing an agency's discretionary decisions, is inapplicable to agency actions falling within the purview of NEPA. *Id.* The mandatory nature of NEPA's directive that an EIS must be prepared for actions that may significantly affect the quality of the human environment renders the "reasonableness" standard the appropriate standard of review. *Id.*

B. *The NEPA Claims.*

By its terms, NEPA mandates the preparation of an EIS for all "major federal actions significantly affecting the quality of the human environment . . . ," NEPA § 102(2) (C), 42 U.S.C. § 4332(2) (C). *See also, Kleppe v. Sierra Club,* 427 U.S. 390, 399 (1976). The broad scope of NEPA represents a firm congressional mandate directing agencies to consider environmental factors on an equal basis with other, more traditional, concerns, prior to taking action. *Foundation for North American Wild Sheep v. United States,* 681 F.2d at 1177.

The plaintiffs assert two distinct NEPA claims. First, the plaintiffs contend that the decision to issue oil and gas leases in the Deep Creek Area constitutes a major federal action significantly affecting the quality of the human environment, which requires the preparation of an EIS. 42 U.S.C. § 4332(2) (C) (i). Second, the plaintiffs maintain that because NEPA requires agencies to consider reasonable alternatives to a contemplated federal action, a "no-leasing" alternative was reasonable and should have been considered. 42 U.S.C. § 4332(2) (E).

(1) *Major Federal Action*

In analyzing the merits of a NEPA claim, the courts must heed NEPA's broad scope in forcing agencies to be actively aware of environmental concerns. "The statutory phrase 'actions significantly affecting the quality of the environment' is intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n.*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). The prescriptions of NEPA require an agency to prepare an EIS for all proposals which may significantly affect the quality of the human environment. In that regard it has been stated:

> The standard for determining whether the implementation of a proposal would significantly affect the quality of the human environment is whether "the plaintiff has alleged facts which, if true, show that the proposed project *may* significantly degrade some human environmental factor". *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 at 597 (9th Cir. 1981) (emphasis in original). *See also, City and County of San Francisco v. United States*, 615 F.2d at 500; *City of Davis v. Coleman*, 521 F.2d at 673; *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973) (Emphasis Supplied).

Foundation For North American Wild Sheep v. U.S., 681 F.2d at 1177-78.

Consequently, this court must determine if "substantial questions" are raised with respect to whether the Deep Creek Area leases may have a significant effect

upon the human environment. If such questions are raised, the defendants' failure to prepare an EIS violated NEPA. *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985); *Foundation For North American Wild Sheep*, 681 F.2d at 1178.

The Forest Service prepared an Environmental Assessment ("EA") for the proposal to lease the Deep Creek Area. The analysis conducted resulted in a Finding of No Significant Impact ("FONSI"). After listing the alternatives purportedly considered, the EA concluded by recommending that surface occupancy in the Deep Creek Area on slopes less than 40 percent in grade be allowed, provided the leases contained certain restrictive stipulations which would serve to mitigate, to a certain extent, the environmental degradation caused by oil and gas exploration activities. These mitigating measures, in turn, would be followed by site-specific assessments based upon individual proposals from lessees. The Forest Service determined that the environmental effects would be subject to the scope of activities proposed for a specific site and that further assessments, or, perhaps, an environmental impact statement, would be conducted at a point in time when the analyses would be more meaningful, because the extent of the lessees' proposed activities would be known. The defendants took and maintain the position that the act of leasing alone does not result in environmental degradation, a fact which obviates the need for an EIS at the leasing stage. Moreover, the defendants submit, individual, staged, assessments of the effects of oil and gas activities is an acceptable method of procedure under NEPA.

(a) *Stipulations.*

Citing *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears, et al. v. Peterson,* 685 F.2d 678 (D.C. Cir. 1982), the defendants assert that an agency may consider mitigation measures that reduce environmental impacts to a minimum when determining whether an EIS is required:

> If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impact stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required.

685 F.2d at 682.

The plaintiffs do not dispute the proposition of effective mitigation, but contend that the measures established by the stipulations in the leases at issue would not serve to "completely compensate for any possible environmental impacts." The court agrees. In that regard, the EA prepared for the Deep Creek Area concludes that exploration activities alone, assuming no commercial development or production takes place, will substantially impair the wilderness character of Deep Creek for a period of 3 to 20 years and would reduce Deep Creek's wilderness rating from a perfect 28 to a mediocre 19.

One protective stipulation, covering 75% of the leased Deep Creek Area, which is of particular importance, is the No Surface Occupancy ("NSO") restriction. The NSO restriction prohibits any activity in the particular leased area. The NSO stipulation, however, should not be used to circumvent the requirement of preparing an

EIS. *Conner v. Burford*, 605 F.Supp. 107, 108 (D. Mont. 1985).

The federal defendants have not asserted that their environmental concerns for the Deep Creek Area are resolved by the protective stipulations and the completion of the Deep Creek Area EA. They anticipate further review and analysis based on specific proposals from lessees.

(b) *Multi-Stage Analysis.*

Asserting the propriety of environmental analysis in stages, defendants place special emphasis upon the rationale of *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978). In *Hathaway*, the BLM prepared an Environmental Analysis Record on the Alvord Desert Geothermal Leasing Program and determined that preparation of an EIS was not necessary. The BLM issued leases which permitted only "casual use", a term defined by regulation which does not include activities off existing roads. 579 F.2d at 1165, n.4. The Deep Creek Area is, of course, a roadless area, and oil and gas exploration will involve substantial off road activities resulting in appreciable environmental degradation.

The defendants also rely on the holding of the Second Circuit Court of Appeals in *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2nd Cir. 1977), *cert. den.*, 434 U.S. 1064 (1978), wherein that court held that it would be a "meaningless exercise" to attempt to project possible consequences of future, and uncertain, oil pipeline projects. In *County of Suffolk*, the court stated that the rule of reason in determining whether environmental

analysis has been sufficient to comply with NEPA depends on two factors: (1) whether obtaining more detailed information of the topic under consideration is "meaningfully possible" at the time and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project. 562 F.2d at 1378. With respect to the Deep Creek Area, the defendants claim that it is neither meaningfully possible nor important to obtain more detailed information unless and until site specific proposals from lessees create a need for more information.

In *State of California v. Block,* 690 F.2d 753 (9th Cir. 1982), the Ninth Circuit Court of Appeals found that the Forest Service had violated NEPA by designating certain roadless areas under RARE II as "Non-Wilderness" without sufficient site-specific environmental analysis. Non-Wilderness designation precluded the areas from consideration for inclusion in the National Wilderness Preservation System for 10 to 15 years. The court found that the Forest Service's plan to respond to specific development proposals with further site-specific environmental studies was ineffective because:

> [T]he 'critical decision' to commit these areas for nonwilderness uses, at least for the next ten to fifteen years, is 'irreversible and irretrievable'. The site specific impact of this decisive allocative decision must therefore be scrutinized now and not when specific development proposals are made.

690 F.2d at 763.

The defendants, in the case at bar, seek to impress upon the court that the scope of the Deep Creek Area project is such that it is not conducive to site specific

analysis until individual applications for development are proposed. Specific analysis is required by NEPA, however, before the "critical decision" is made.

> Although the agency does have discretion to define the scope of its actions, *Block*, 690 F.2d at 765, such discretion does not allow the agency to determine the specificity required by NEPA.

City of Tenakee Springs v. Block, 778 F.2d 1402 (9th Cir. 1985).

The court concludes that it is not only meaningfully possible and important to discover the site specific consequences on the human environment of the Deep Creek Area before the critical agency decision is made, but NEPA mandates that course of action.

The "critical decision" for the Deep Creek Area is the decision to issue oil and gas leases in the first instance. The Ninth Circuit Court of Appeals, in *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), recently had occasion to elucidate when an EIS must address subsequent phases. In *Thomas*, the court held that road construction associated with timber sales was a connected action and must be studied in a single EIS. The court stated:

> In *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974), we addressed the issue of when subsequent phases of development must be covered in an environmental impact statement on the first phase. We stated that an EIS must cover subsequent stages when 'the dependency is such that it would be irrational, or at lease unwise, to undertake the first phase if subsequent phases were not also undertaken.' *Id.* at 1285.

753 F.2d at 759.

The first step in the oil and gas leasing process is obviously the issuance of the leases themselves. It would undoubtedly be "irrational, or at least unwise" to undertake a leasing program, if exploration and ultimate development were not only contemplated but possible. As the Ninth Circuit found in *Cady v. Morton,* 527 F.2d 786 (9th Cir. 1975), a lessee's capital investments and contractual commitments are relevant to a determination of the interdependence of staged activities. 527 F.2d at 795.

(c) *Cumulative Effects.*

The rationale of *Cady v. Morton, supra,* is pertinent to the other crucial issue presented in the case *subjudice, i.e.,* cumulative effects. In *Cady,* the court stated:

> . . . [I]t cannot be denied that the environmental consequences of several strip mining projects extending over 20 years or more within a tract of 30,786.45 acres will be significantly different from those which accompany [the single lessee's] activities on a single tract of 770 acres.

527 F.2d at 795.

The cumulative effects of several oil and gas operations in the Deep Creek Area will be "significantly different" than those of a single operation upon any one of the subject leases. "Obviously a comprehensive analysis of cumulative impacts of several oil and gas development activities must be done before a single activity can proceed." *Conner v. Burford,* 605 F.Supp. at 109; *see also, Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir. 1974). In that regard, "significantly" is defined by the Council on Environmental Quality to include the severity of the impact. A

factor to be utilized in determining the severity in any cumulative impacts situation, is stated as follows:

> [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 C.F.R. § 1508.27(b) (7).

The foregoing conclusion is in accord with the unassailed principle that an EIS must be prepared at an early stage in the project's planning process in order to assure that the environmental impacts will be considered in the decision making process. The necessity for preleasing analysis of potential cumulative effects is clear, where the decision taken by the agencies is an irretrievable choice "between the two competing and mutually exclusive demands of wilderness use and development." *California v. Block,* 690 F.2d 753, 767.

The United States Supreme Court has interpreted the mandate of NEPA to require federal agencies to take a "hard look" at the environmental consequences of their decisions. *Kleppe v. Sierra Club,* 427 U.S. at 410 n.21. Review of the Deep Creek Area project reveals the agencies' intent to take a delayed look at the environmental consequences which may flow from oil and gas exploration and development in the Area. The defendants have initiated a pattern of procrastination, not examination, of environmental concerns. *Foundation for North American Wild Sheep v. U.S.,* 681 F.2d at 1181; *Jette v. Bergland,* 579

F.2d 59, 63 (10th Cir. 1978). In *Foundation for North American Wild Sheep*, the Ninth Circuit Court of Appeals stressed that procrastination by the federal agencies with respect to environmental concerns is foreclosed by NEPA. 681 F.2d at 1181. In that case, the court concluded that the Forest Service's determination that the subject road would be closed, in the event of a forty percent reduction in the use of the area by the affected sheep, represented "an agency decision to act now and deal with environmental consequences later." *Id.* The forty percent figure used by the agency in *Foundation for North American Wild Sheep* is coincidentally analogous to the present defendants' use of a forty percent grade in slope as the threshold for the limit of leasehold surface occupancy. The conclusion that damage to the environment will not occur at slopes less than forty percent is not supported in the record.

The defendant agencies violated NEPA by failing to prepare an EIS for the Deep Creek Area oil and gas leasing program. Later site specific analysis and protective stipulations simply do not comply with NEPA's comprehensive mandate to make early informed decisions and research cumulative effects of major proposed actions.

(2) *The No Leasing Alternative.*

NEPA requires that agencies set forth alternatives to a proposed action. An integral part of an EIS is the discussion and consideration of alternatives. 42 U.S.C. § 4332(2)(C)(iii). 42 U.S.C. § 4332(2)(F) requires agencies to "study, develop, and describe appropriate alternatives

to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." In the case at bar, the plaintiffs assert that the defendant agencies failed to sufficiently analyze the alternative of denial of all leases in order to preserve the Deep Creek Area for possible future wilderness designation by Congress.

The defendant agencies claim that the no-leasing alternative was considered, but that current policy, as reflected in provisions 2822.14b and 2822.46 of the Forest Service manual, required the decision to reject all leases to be based on "identified unacceptable and unavoidable conflicts with surface uses and resources." Because the EA did not find the "unavoidable conflicts," the defendants submit the no-leasing alternative was properly rejected. The plaintiffs, however, contend that the decision of the Secretary of Interior to lease the Deep Creek Area, based on the recommendations of the Forest Service and the BLM was defective because the agencies concluded that they could not base a decision to reject leases on wilderness preservation alone. The position asserted by the Secretary, to the effect that the Secretary is divested of the discretion to refuse to issue leases solely to protect wilderness characteristics, is, the plaintiffs submit, based on fatally flawed logic.

This court recognizes the broad scope of an agency's duty to study all reasonable alternatives. Appearing twice in the text of NEPA, the duty is more pervasive than the duty to prepare an EIS. *See, State of California v. Bergland*, 483 F.Supp. 465, 488 (E.D. Cal. 1980), modified on appeal, *sub nominee, State of California v. Block, supra*. In the context of the Deep Creek Area leases, the agencies

erred by failing to prepare an EIS which developed alternatives. The alternatives discussed must include the no-leasing alternative. With the knowledge that oil and gas activities will potentially preclude wilderness preservation for at least a generation and, therefore, wilderness designation:

> . . . the promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development.

California v. Block, 690 F.2d 753 at 762, 763 (9th Cir. 1982).

The analysis of the wilderness preservation/no leasing alternative is necessary at a time when that alternative is still viable, a time which is limited to the pre-leasing stage. Contrary to the assertion of the defendant agencies, the mere listing of the no-leasing alternative without any meaningful consideration, will not suffice to satisfy the mandate of NEPA.

C. *Regulatory Violations.*

The plaintiffs contend that by leasing the Deep Creek Area without an EIS the defendant agencies violated their own regulations. The preparation of the Deep Creek Area EA and its Finding of No Significant Impact, the agencies submit, satisfy the requirements of their regulations. The court rejects the defendants' position.

The Forest Service's regulations, which are identical to those promulgated by the Council on Environmental Quality, require the preparation of an EIS for the Deep Creek Area leasing. 40 C.F.R. § 1508.27(b) lists several factors to be utilized in determining the intensity of an action's impact on the human environment. Included in

the list is the degree to which the effects on the quality of the human environment are likely to be highly controversial, and the cumulative effect of several oil and gas development activities. 40 C.F.R. § § 1508.27(b)(4) and (7). The effect on the Deep Creek Area which would be occasioned by oil and gas exploration and development is a highly controverted issue.

An agency is bound by the terms of its own regulations. *Foundation for North American Wild Sheep v. U.S.*, 681 F.2d at 1182. Therefore, to the extent that the Forest Service failed to reach a finding of significant impact and failed to prepare an EIS, it violated its own regulations.

D. *The Endangered Species Act.*

Finally, the plaintiffs assert the defendant agencies violated the Endangered Species Act by failing to gather species and habitat data sufficient to make an informed biological assessment of the effects of leasing the Deep Creek Area.

Under the ESA, all agencies must ensure that their actions are not "likely to jeopardize the continued existence of any endangered species, or threatened species, or result in the destruction or adverse modification" of the cultural habitat of such species. 16 U.S.C. § 1536(a)(2). In order to effectuate this mandate with respect to the Deep Creek Area, the Forest Service consulted with the Fish and Wildlife Service which, in turn, conducted a biological assessment to determine the existence of threatened or endangered species in the Deep Creek Area. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.04. The Fish and Wildlife Service found that four species protected by ESA, *i.e.*, the grizzly

bear, the gray wolf, the peregrine falcon, and the bald eagle, were known to use, or have essential habitat in, the Deep Creek Area, although their presence or absence was not conclusively determined. The issuance of oil and gas leases, however, was found not likely to jeopardize these species or their cultural habitat. The biological opinion that the Deep Creek Area leasing would not violate ESA was limited to lease issuance because data and information for all stages of activity was obviously not available. The agencies take the position that further study will be conducted on the effects of each step of the oil and gas development process as they arise.

The plaintiffs submit that the BLM did not make an informed decision with respect to ESA's mandates. In support of their contention, the plaintiffs cite language from the letter of the Fish and Wildlife Service pertaining to the Deep Creek Area, which warns of conflicts where insufficient investigation occurs:

> Leasing with little or no information on key habitat components and use patterns for the listed species in the Deep Creek Area is setting the stage for possible future conflicts between energy development and the conservation of endangered and threatened species. Early identification of the potential conflict areas so that sound planning on a regional basis can be initiated would provide a more positive approach.

The leading ESA case, *TVA v. Hill*, 437 U.S. 153 (1978), strictly construed the language of the Act in enjoining the 80% complete Tellico Dam Project after the discovery of the endangered snail darter.

> The pointed omission of the type of qualifying language previously included in endangered species

> legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies.

437 U.S. at 185.

Clearly the "primary missions" of oil and gas exploration and development must give way to affirmative investigation of "potential conflict areas." Defendants claim the *TVA* facts are substantially different in that the snail darter and its habitat faced certain eradication. The intent of ESA and the principles of *TVA*, cannot, however, be so narrowly construed. The Supreme Court in *TVA* clearly expressed the broad mandate to preserve species, citing the interpretation of Representative Dingell, House anager of the bill, of the mandatory nature of § 7:

> Another example . . . [has] to do with the continental population of grizzly bears which may or may not be endangered, but is surely threatened . . . Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture or whatever, *will have to take action*, to see that this situation is not permitted to worsen, and that these bears are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out. . . . [T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.* 119 Cong.Rec. 42913 (1973). (Emphasis supplied.)

437 U.S. at 183, 184.

The agency planning process is the time frame for which NEPA and ESA have their most efficient consequences. We need not proceed to 80% completion of a

major oil and gas development project only to force termination due to discovery of the destruction of threatened and endangered species or their cultural habitat. The defendants seek court approval of an ESA compliance scheme of responding to specific activity proposals and enforcing restrictive stipulations where threats arise. This court, bound by the priority of ESA over the primary missions of the agencies, cannot approve such a plan of action. Defendants assert that their assessment encompasses "the best scientific and commercial data available" and that, therefore, their investigation is sufficient. 16 U.S.C. § 1536(a)(2). The agency, however, cannot propose a project so expansive and comprehensive as the Deep Creek Area leasing project, and then claim that the "available" data is sufficient. The Fish and Wildlife Service's suggestions of "early identification" and "sound planning on a regional basis" are good advice, advice which is more formally expressed in *TVA v. Hill, supra,* and the ESA itself.

The agency is also required to conserve threatened and endangered species to the extent that they are no longer threatened and endangered. *Carson-Truckee Water Conservancy District v. Clark,* 741 F.2d 257 (9th Cir. 1984). "The plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost." *TVA v. Hill,* 437 U.S. 153, 184 (emphasis added).

III. *CONCLUSION*

In *Conner v. Burford,* 605 F.Supp. 107 (D. Mont. 1985), this court rejected post-leasing, site-specific environmental assessments as violative of NEPA and post-leasing, site-specific biological assessments as violative of the

ESA. The record in the case *sub judice* compels the same result with respect to leasing in the Deep Creek Area. The cumulative impacts of several separate oil and gas exploration and development activities in the Deep Creek Area have not been properly assessed. As wilderness preservation will no longer be a viable alternative in the Deep Creek Area after oil and gas exploration and/or development begins, neither, certainly, can conservation and promotion of threatened and endangered species.

Therefore, under the provisions of 5 U.S.C. § 706, the actions of the defendant agencies, allowing the issuance of oil and gas leases in the Deep Creek Area, are HEREBY SET ASIDE. The defendant agencies are enjoined from making further recommendations to lease and issuing leases pending compliance with NEPA, agency regulations, and the ESA.

NOW, THEREFORE, IT IS HEREBY ORDERED that defendants' and intervenors' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is GRANTED.

DATED this 27 day of May, 1986.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX C

Mineral Leasing Act
30 U.S.C. 226(a)

§ 226. Lease of oil and gas lands.

(a) Authority of Secretary

All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

* * *

National Environmental Policy Act
Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982)

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 USCS § 552], and shall accompany the proposal through the existing agency review processes;

* * *

Section 104, 42 U.S.C. § 4334 (1982)

§ 4334. Other statutory obligations of agencies

Nothing in Section 102 or 103 [42 USCS §§ 4332, 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Jan. 1, 1970, P. L. 91-190, Title I, § 104, 83 Stat. 854.)

Endangered Species Act
Section 7, 16 U.S.C. 1536 (1982)

16 U.S.C. 1536 (a)(2)

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. 1536(b)

* * *

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of

this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that –

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; and

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that –

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and

(iii) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clause (ii).